

1 UNITED STATES BANKRUPTCY COURT
2 EASTERN DISTRICT OF NEW YORK
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In re: . Brooklyn, New York
January 23, 2012
OER MEDIA GROUP, INC. .
Debtor. . 11-47385
Calendar Time:
2:00 P.M.

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5 [78] FIRST APPLICATION FOR COMPENSATION FOR
6 GOETZ FITZPATRICK, LLP AS COUNSEL TO DEBTOR;
7 FEES; 114,994.00, EXPENSES: 3,769.56

8 HEARING (RE: RELATED DOCUMENT(S) 72 MOTION FOR
9 2004 EXAMINATION

10 BEFORE HONORABLE ELIZABETH S. STONG
11
12

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1 THE CLERK: Numbers 15 and 16 57 on the calendar,
2 OTR Media Group, application for compensation and hearing re:
3 2004 examination.

4 THE COURT: Good afternoon.

5 MR. KUSHNER: Good afternoon, your Honor. Gary
6 Kushner, Goetz Fitzpatrick, counsel for the debtor.

7 MR. SIMON: Scott Simon, Goetz Fitzpatrick, counsel
8 for the debtor.

9 THE COURT: Thank you.

10 MR. KLEINMAN: Alan Kleinman, New York City Law
11 Department.

12 MS. MARTIN: Marylou Martin representing the United
13 States Trustee.

14 MR. DAVIS: Wayne Davis of Tannenbaum, Helpern
15 Syracuse & Hirschtritt, on behalf of Metropolitan National
16 Bank.

17 MR. HORAN: Brian Horan, New York City Law
18 Department.

19 THE COURT: All right. I'm glad to have you all
20 here.

21 Mr. Kushner, let's hear from you first on the
22 status.

23 MR. KUSHNER: I was going to handle the fee
24 application for Goetz Fitzpatrick, and Mr. Simon was going to

1 handle the 2004 application.

2 THE COURT: That's fine.

3 MR. KUSHNER: So does your Honor have a preference
4 of the order?

5 THE COURT: Do we also have other matters on the
6 calendar?

7 MR. KUSHNER: Yes. There -- in OTR?

8 THE COURT: Yes.

9 MR. KUSHNER: No.

10 THE COURT: I guess that's it, not status. Unusual.
11 All right.

12 MR. KUSHNER: I think that's on for the 14th, your
13 Honor.

14 THE COURT: Let's take up the questions of the
15 compensation application. There have been some issues
16 identified. I'm hoping they've been worked out.

17 MR. KUSHNER: They have not been worked out, your
18 Honor. So if I may --

19 THE COURT: Please.

20 MR. KUSHNER: -- present the application? Your
21 Honor, Goetz Fitzpatrick has filed its first interim
22 application for compensation and reimbursement of expenses
23 covering the period of August 25th of 2011, which was the
24 filing date, through November 30th, 2011. It seeks \$114,994

1 in fees, 3,769.56 in disbursements, for a total award of
2 \$118,763.56. Notice of the application itself was sent to all
3 parties and creditors in interest, and the application along
4 with the notice was sent to the various parties that have
5 appeared in this case, including the parties that I believe
6 are in Court and the United States Trustee.

7 There has been one objection filed by the United
8 States Trustee which I'll address. I just want to go through
9 generally what happened involving Goetz Fitzpatrick's
10 retention. We received an initial retainer in early August,
11 about three weeks before, three and a half weeks before the
12 bankruptcy case in the amount of \$65,000, and prior to the
13 bankruptcy filing we did some work primarily in connection
14 with resolutions with the city or negotiations with the city
15 and various work associated with litigation that was
16 ultimately filed in the Court and with the petition and
17 schedules in anticipation of having to file a petition on a
18 rather expedited basis.

19 We charged the pre-petition retainer, the amount of
20 \$17,867 for services during that three and a half week period,
21 leaving a balance of the pre-petition retainer of \$47,133.

22 We seek approval of that amount of money, the
23 retainer balance of 47,133 plus an additional request for
24 services rendered that we have received no compensation. That

1 totals \$67,861 for fees and \$3,769.56 for expenses, for a
2 total additional payment -- actual payment of \$71,630.56.

3 I generally describe comprehensively in the
4 application the types of services that were performed. This
5 Court already knows that a lot of the work that Goetz
6 Fitzpatrick has been required to do in connection with its
7 representation of the debtor has been in connection with
8 various litigations with the City of New York dealing with,
9 among other things, lift stay motions which are -- were more
10 than the ordinary garden variety lift stay motion. They
11 involved complex issues of law and facts and what have you.

12 Ultimately that litigation, one proactive by the
13 debtor in the form of an adversary proceeding and one in the
14 context of the city's motion for stay relief, has been
15 resolved by the Court to some degree, which affords the debtor
16 some breathing spell as to the need to attend to litigation on
17 non-active sites which will spare the debtor some time and
18 expense in defending those claims by the city. In other
19 words, the motions have been resolved to the point where the
20 city is continuing its enforcement of the sign laws as against
21 only active signs, which are certainly more manageable than
22 what the debtor had been dealing with prior to the bankruptcy
23 filing.

24 Other significant work that the debtor has done --

1 that Goetz Fitzpatrick has done on behalf of the debtor is
2 enter into extensive negotiations with Metropolitan National
3 Bank for a cash collateral stipulation. The form of an
4 initial cash collateral -- interim cash collateral stipulation
5 was agreed to by order of this Court early on in the case, and
6 basically has been modified and amended to the point where we
7 will submit a second interim application on the February 14th
8 next hearing date for use of cash collateral, but during the
9 first interim period a significant amount of work was done
10 investigating Metropolitan National Bank's security interest,
11 dealing with budget requirements, dealing with ordinary types
12 of matters that are associated with cash collateral
13 stipulations.

14 During the first interim application period Goetz
15 Fitzpatrick spent a significant amount of time working with
16 landlords who were obviously concerned with litigation that
17 the city had commenced against both the debtor and the
18 landlords in connection with leases for the locations where
19 the debtor advertises or places its advertisements on. There
20 are approximately 18 I believe locations. I can tell you that
21 I spoke -- I have spoken to substantially all of those
22 landlords dealing with updating them with respect to why we
23 filed for Chapter 11, what the events were ongoing in Chapter
24 11, dealing with other things such as lease assumptions and

1 lease rejections, extensions of time for assumptions of lease
2 or the rejections of leases, dealing with various claims that
3 each landlord had, dealing with multiple problems where the
4 city was involved in taking remedies during the Chapter 11
5 case, all of which I believe are summarized in greater detail,
6 your Honor, in the application itself.

7 Goetz Fitzpatrick has been involved with the process
8 of getting the retention of ordinary course professionals
9 approved by this Court. In many regards, your Honor, the
10 debtor's business is highly regulated. It involves a
11 compliance with not only the sign laws, but various other
12 types of zoning matters and things that are particular to the
13 administrative burdens of operating this type of business.

14 The debtor has used -- had used a number of
15 professionals prior to the bankruptcy filing. Initially we
16 brought on an application on an ex parte basis to have those
17 professionals retained. Through the comments of the United
18 States Trustee that ultimately wound up into a full-blown
19 hearing, but the work associated with getting these folks on
20 board in a manner that they felt reasonably assured that not
21 only would they be properly retained, but also be paid for
22 their services, that Goetz Fitzpatrick was integrally involved
23 in during the first interim application period.

24 Goetz Fitzpatrick attended a number of Court

1 hearings. All of those are laid out on pages eight and nine
2 of the application. We've dealt with various claims that have
3 been asserted against the estate, and then generally
4 throughout the application there's a number of broader
5 categories that we've dealt with.

6 The U.S. Trustee -- I guess I'll let the U.S.
7 Trustee deal with its objections. We filed a reply, your
8 Honor, to the UST objection, and if I may just defer a
9 response to the UST until the UST --

10 THE COURT: In a general way there's no doubt that a
11 lot of good work was done and had to be done early on.
12 There's I think a serious question about whether the case has
13 made all the progress that we'd all like to see it make or
14 have made at this point. The objections of the Office of the
15 United States Trustee struck me as fairly precise, and they
16 seem to aim at just over seven percent of the total amount
17 that you're seeking. I don't want to underestimate the
18 importance of \$16,050, but I want to hear from Ms. Martin.
19 I'd like to know, to understand better whether the balance is
20 not objected to and whether it's contemplated from your
21 perspective, Mr. Kushner, and your firm's that the -- that
22 whatever amount is approved in response to this application if
23 you're seeking to have it not only approved, but also paid at
24 this time. If you think there's a basis to pay it, how that

1 would fit in the cash flow picture here.

2 Those are the kinds of questions that I see as
3 significant, fairly practical questions, and it may be that
4 they are also questions that are only focused on a fraction, a
5 small fraction --

6 MR. KUSHNER: I didn't --

7 THE COURT: -- seven percent --

8 MR. KUSHNER: I didn't read the --

9 THE COURT: -- of what's being sought.

10 MR. KUSHNER: I didn't read the objection that way,
11 your Honor. I read --

12 THE COURT: It may be that more broadly with respect
13 to the progress and the cash flow situation there's also some
14 bigger concerns, but you know, lumping and multiple
15 attendance, these are issues that often I see counsel in the
16 United States Trustee's Office agree on ultimately with some
17 modification often in the position from both sides.

18 MR. KUSHNER: I could deal with those aside, but as
19 you know, I typically have. When I read the UST objection, I
20 read it that they requested that Goetz Fitzpatrick withdraw
21 the application in its entirety or in the very best case
22 scenario to be allowed a percentage of only the pre-petition
23 retainer, and no additional fees aside from the issues of
24 lumping and vagueness and what have you.

1 That is not acceptable to Goetz Fitzpatrick. What
2 is acceptable to Goetz Fitzpatrick would be to give a blanket
3 percentage award to all of the application with an opportunity
4 to go back to the United States Trustee either on a short
5 basis or even at the next application for allowances to deal
6 with the specific objections to vagueness, lumping, and what
7 have you. That I can do with the United States Trustee, and
8 we could take that off the top and reserve it or include it in
9 whatever percentage, but to just get approval for a less than
10 one hundred percent of the retainer and get nothing for the
11 four months worth of work is objectionable to Goetz
12 Fitzpatrick, your Honor.

13 THE COURT: Well, it certainly does give us
14 something to talk about because I take all of your points and
15 I think they're supported by the record in many ways. I also
16 don't see yet suggested in the record what is typical in some
17 situations to see as some idea of a holdback with respect to
18 approved fees, but an amount to be held back pending further
19 developments in the case and the ability to make the payments
20 and the appropriateness down the road.

21 So let's hear from Ms. Martin and see if we can make
22 some headway on this.

23 MR. KUSHNER: Thank you.

24 THE COURT: Thanks very much, Mr. Kushner.

1 MS. MARTIN: Thank you, your Honor. Your Honor, the
2 U.S. Trustee's objection -- overall objection is based upon
3 the debtor's financial condition. The November operating
4 report indicates that the debtor has only \$60,000 in cash.
5 The fee application seeks fees in excess of \$100,000. So
6 administrative insolvency is a real concern in this case.

7 So aside from the other objections we have with
8 regard to vagueness and excessive interoffice conferences and
9 lumping, and perhaps those are issues that can be resolved,
10 your Honor, but bigger -- the bigger concern is where is the
11 money coming from? And if we can establish where the money is
12 coming from perhaps we could reach some sort of a resolution,
13 your Honor.

14 THE COURT: Which might well include taking an
15 amount which would put to the side for the moment any amounts
16 related to unresolved issues, the specific issues that you've
17 identified, and then looking at that number incrementally,
18 some kind of an appropriate holdback and an understanding as
19 to when, from whence, and how payment would be made. I think
20 that sounds like a very sensible way to proceed, and I'd
21 encourage the parties to take even a few minutes now to talk
22 about that at an appropriate interval in this afternoon's
23 hearing.

24 I think the practical questions are the basis for

1 the concerns which might sound theoretical. If there's that
2 much money there, then you could take -- you could reach
3 either conclusion on whether the fee should be paid. If the
4 money's not there then the question is what are we really
5 talking about? So that's --

6 MS. MARTIN: Your Honor, we've been told that the
7 November -- I'm sorry, the December operating report will show
8 that there's funds set aside apparently for legal fees,
9 however, that operating report has not been filed.

10 THE COURT: When is it expected, Mr. Kushner?

11 MR. KUSHNER: It's already been set aside, your
12 Honor. We will --

13 THE COURT: The operating report.

14 MR. KUSHNER: It should have been in my hands before
15 this hearing.

16 THE COURT: Agreed.

17 MR. KUSHNER: I would gather some time either later
18 today or tomorrow.

19 THE COURT: Soon.

20 MR. KUSHNER: And I would have liked to have had
21 that operating report because I think it really is inapposite
22 to -- it would show that the U.S. Trustee's -- and I say this
23 respectfully, reading of the reports to date has been faulty
24 to some degree.

1 THE COURT: Well, of course, that office can only
2 read what it has.

3 MR. KUSHNER: That's right, but as it -- what it has
4 already is an operating report through November.

5 THE COURT: And?

6 MR. KUSHNER: And the debtor has in fact shown a
7 profit of roughly \$450,000. What the U.S. Trustee I don't
8 think into account, and again, I had a conversation with Mr.
9 Curtin, a very pleasant conversation. A couple of things that
10 weren't taken into account, that I don't think were considered
11 by the United States Trustee, during the case of the case,
12 your Honor, the debtor has been paying \$40,000 a month to
13 Metropolitan National Bank. So I think it's five months that
14 were -- payments were made during -- through the December
15 period anyway. Through the November period it was four
16 months, so that's \$160,000 in cash that it would have had in
17 the bank. The second thing that I think that the debtor --

18 THE COURT: Except that it paid -- made payments it
19 had to make. I'm not sure I understand how that argument
20 advances the ball.

21 MR. KUSHNER: Well, in terms of administrative
22 insolvency this was done. It's not administratively
23 insolvent. Its cash flow has been effected to some degree by
24 these extraordinary expenses that are continuing to be made.

1 THE COURT: How is paying the secured creditor an
2 extraordinary expense?

3 MR. KUSHNER: Because -- because under the cash
4 collateral formula ordinarily all you need to do is give
5 adequate protection. The collateral base has actually
6 increased, but as a condition for use on a consensual basis we
7 agreed to pay more than just adequate protection payments. We
8 agreed to pay down a principal portion on a month to month
9 basis. If you were just to go on a straight vanilla adequate
10 protection analysis where they would get theoretically
11 interest on their secured position, the payment would have
12 been actually close to about \$6,000 a month.

13 So we're accommodating the lender in return for
14 consensual use in order to avoid a fight. I don't think that
15 anybody would have a problem with that, but the cash flow
16 itself --

17 THE COURT: No one does, and I wouldn't encourage
18 you to create one.

19 MR. KUSHNER: No, no, no. But so, and I also want
20 to point out that the debtor's accounts receivable balance as
21 of the petition date, as set forth in our reply, is roughly --
22 as of the petition date it was roughly \$1,500,000 and I think
23 it was 77,000, it may have been \$87,000. It has now increased
24 to \$1,877,000, some increase of about \$300,000.

1 THE COURT: Is the increase in the aged category or
2 in the --

3 MR. KUSHNER: No.

4 THE COURT: -- new category?

5 MR. KUSHNER: This is all new. This is all new.

6 THE COURT: This is 30 days or less?

7 MR. KUSHNER: That's right. That's right. These
8 are all good receivables. I mean the debtor typically
9 contracts with triple A types of clients, Sony Corporation,
10 various large companies that do these massive billboards, so
11 the collection aspect has never been a problem. It was
12 delayed somewhat at the beginning of the case when the filing
13 took place, which is typical -- a typical knee jerk type of
14 response. "You're in bankruptcy. We'll hold off on paying,"
15 but in effect if you take a look at the operating reports, the
16 debtor's sales have been strong and the accounts receivable
17 base have actually collected in December, which is the third
18 thing that I wanted to point out.

19 In December, pursuant to the agreement with
20 Metropolitan National Bank, we set aside \$50,000 to be paid to
21 -- assuming that the Court would grant some or all of this
22 application, so that money's already been set aside, hasn't
23 effected the debtor's operations at all, okay, and is being
24 held in accordance with the budgets that have been approved by

1 Mr. Davis and myself or have been discussed by Mr. Davis and
2 myself.

3 The last thing is we're not asking for 100 and -- I
4 just want to get the right number, \$114,000 payment. We've
5 already received before the operating reports were even
6 necessary 65, of which approximately 47,000 and change was
7 already paid and we're holding in our accounts, so that really
8 all we're asking for is \$71,000, your Honor, in terms of an
9 additional payment.

10 So you know, I think and I certainly respect the
11 U.S. Trustee's concerned about the financial aspects or the
12 financial condition of the debtor, but we've never taken the
13 last nickel on a fee application to impair our clients from
14 operating its business. We're talking about an approval and
15 an assumption that these sums will be available and will not
16 impair the debtor's ability to operate.

17 THE COURT: I think the operating report will be
18 extremely helpful. It's not fair to you to have you recite
19 chapter and verse of a document that you haven't seen yet, nor
20 to expect the Office of the United States Trustee to proceed
21 in a vacuum, especially where it sounds like the information
22 will be supportive, will be helpful, and will bring current
23 information that as of the moment is not especially helpful to
24 the position you're arguing.

1 Who else would like to be heard on this? I'd like
2 to hear any other -- hear any of the parties who would like to
3 be heard and then I'm inclined to ask Ms. Martin and Mr.
4 Kushner at the appropriate time, maybe after we get past the
5 next issue, to confer on this and see if we can come up with a
6 way to move forward. I think it makes sense for there to be
7 some appropriate compliance with the UST requirements and
8 compensation for counsel's work since the petition date. I
9 can anticipate a situation where issues would be addressed in
10 a way that something in addition to the retainer would make
11 good sense, but there's some questions here that need to be
12 answered before that can be reflected in an order I think
13 hopefully consensually.

14 Yes, from Metropolitan National Bank.

15 MR. DAVIS: Thank you, your Honor. Just a couple of
16 comments. One, just based on Mr. Kushner's remark a few
17 moments ago that it's the debtor's position that the value of
18 my client, Metropolitan National Bank's collateral base has in
19 fact increased during the pendency of this case, that's
20 something that Metropolitan National Bank is not willing to
21 concede at this point.

22 THE COURT: No, and I'm making no finding on either
23 direction on that.

24 MR. DAVIS: A significant amount of the value of our

1 collateral was tied up in the particular lease locations, and
2 we'll talk a bit more about that I believe in the context of
3 the 2004 application, but how that value has been maintained
4 or in fact diminished during the pendency of this case, giving
5 the ongoing battle between the debtor and New York City, is a
6 significant, and I can't over-emphasize significant concern to
7 Metropolitan National Bank.

8 With respect to the fee application specifically,
9 while we did not file a response or an objection and leave it
10 in the good hands of the U.S. Trustee's Office, let's focus on
11 the form and the detail of the application itself. It just
12 should be clear to all that the bank is -- shares the concern
13 that there appears to be little substantive progress made
14 toward the emergence of this debtor from Chapter 11 given what
15 will be next month six months in Chapter 11. We'll talk about
16 that more, but it's a significant concern.

17 THE COURT: I appreciate that. Anything to say?

18 MR. KLEINMAN: No comment, your Honor.

19 THE COURT: All right. All right. So I think it
20 makes sense to set these issues aside for the moment, not
21 indefinitely of course I assure you, Mr. Kushner. I think
22 it's important that lawyers be paid at the time and under the
23 circumstances that the Code and our Rules permit, and a lot of
24 work has gone into this case already. I recognize that. I

1 think these issues need to be addressed. You need some
2 information in the hands of the Office of the United States
3 Trustee that they'll have very soon it sounds like.

4 I'd like to turn the page for a moment to the next
5 item on the calendar, which is the 2004 examination. That's
6 your burden. I'll hear first from your colleague, and I just
7 want to note for the record that I'm always pleased to hear
8 from the lawyer in the case who's most directly able to speak
9 to the issues, and invite whatever supplementation you as a
10 team decide makes sense. So please, let me hear from you.

11 MR. SIMON: Thank you, your Honor. This is the
12 debtor's application to conduct an examination of specific
13 individuals employed by the city pursuant to Bankruptcy Rule
14 2004 to determine whether the sign laws have been selectively
15 enforced against the debtor.

16 The Court knows that the debtor is making every
17 effort to cooperate with the city. OTR has stipulated to the
18 city's relief from stay to enforce violations on the signs
19 that the debtor is currently operating, but now as a debtor in
20 possession it's our obligation to investigate claims that
21 effect the debtor's estate, and the discovery requested if it
22 leads to litigation may have two effects if the city has
23 selectively enforced the sign laws.

24 First, the debtor could recover money damages and --

1 THE COURT: Under what theory?

2 MR. SIMON: Under --

3 THE COURT: If the -- I want you to assume a clear
4 violation. Does it matter if another entity engaging in the
5 same conduct was not cited? It seems to me that even before
6 you get to the point of prosecutorial discretion it might be,
7 but it also might not be a defense or even more an affirmative
8 cause of action unless you can establish some sort of
9 invidious basis for the city's determination. It may or may
10 not be a defense to the violation that there is what you've
11 called selective enforcement, and I don't -- I don't know what
12 the cause of action would be, but short of some kind of
13 invidious basis to the selective enforcement, if the
14 regulation has been violated is that -- how is that an issue
15 here?

16 MR. SIMON: Well, the question that we have for the
17 Court and for the city in performing this investigation would
18 be whether there is invidious bad faith in putting OTR out of
19 business when the city has unquestionably in our view enforced
20 these sign laws against the debtor when the sign laws have not
21 been enforced against larger publicly-owned outdoor
22 advertising companies that have lobbied the city on their
23 behalf and against OTR.

24 THE COURT: So the -- are you aware of a case that

1 defines, for example, a public company versus a closely-held
2 company as an invidious discrimination?

3 MR. SIMON: I'm not aware at this time.

4 THE COURT: Neither am I. It would surprise me if
5 there were such a case I have to say.

6 MR. SIMON: I mean what Mr. Kushner was just saying
7 is that in addition to the monetary damages, we also have a
8 potential claim for equitable subordination of the city's
9 existing claims.

10 THE COURT: Is that the kind of thing that needs to
11 be addressed at this time in the case where the debtor's got a
12 lot of other issues on its plate, and the question of
13 administrative expense has already been raised?

14 MR. SIMON: Well, considering that the city has
15 repeated to the Court, and the Court wants to know whether
16 this debtor's ability to emerge from Chapter 11 is dependent
17 in large part on whether the debtor has viable legal signs and
18 a viable business plan going forward.

19 THE COURT: The debtor's been absolutely
20 unequivocal, and I've taken counsel at his word that the
21 debtor's only interest is in undertaking a legal business. I
22 have no reason to doubt that's true. I -- is the debtor still
23 not quite in good standing as a business?

24 MR. SIMON: Well, the fact that the city has fought

1 so hard to continue its proceedings against the debtor's
2 existing signs would lead one to believe that the city is not
3 sure that the debtor's existing signs are viable and valid.

4 THE COURT: That's the city doing its job. Mr.
5 Simon, I asked a different question.

6 MR. SIMON: I'm sorry.

7 THE COURT: With respect to the fact that the OTR
8 was at one point, if I recall correctly the record, not in
9 good standing as a business, out of good standing. Is that
10 still the case?

11 MR. SIMON: I believe --

12 THE COURT: That may not be the issue you're most
13 involved with, so I'll look to Mr. Kushner. Are we making any
14 progress on that one?

15 MR. KUSHNER: Your Honor, Gary Kushner. You're
16 talking about the judicial -- the Secretary of State
17 dissolution by proclamation --

18 THE COURT: Yes.

19 MR. KUSHNER: -- issue? That is in the process of
20 being resolved.

21 THE COURT: Okay. You referred to the business
22 being a business in good standing, and I thought actually this
23 is the rare case where the business is not in good standing,
24 speaking very technically.

1 All right. Mr. Simon, I appreciate your being
2 responsive to my questions. I hope it gives you a sense of
3 the kind of concern I have here. If there's discovery, Rule
4 2004 discovery separate from discovery that belong more
5 appropriately with the discovery tools in the adversary
6 proceeding that make sense here, then not only would I be
7 inclined to grant the relief and grant it promptly, but I
8 would assume that the city as a public actor, as a public
9 entity might even have disclosure obligations. If there's
10 information about the regulatory process that it is required
11 to make available, then I wouldn't be surprised if without a
12 2004 order you could follow the appropriate procedures under
13 Freedom of Information type laws and get what you're seeking,
14 but invidious discrimination in the enforcement of the laws,
15 invidiously discriminating against a private company because
16 it is a private company?

17 MR. SIMON: It's not necessarily, your Honor, that
18 the company is solely private. It's also a upstart competitor
19 to large established entities that operate in the city.

20 THE COURT: Some sort of anti-trust conspiracy among
21 your competitors that involves the city as a co-conspirator or
22 something? That's pretty big stuff. Is that really what
23 you're arguing?

24 MR. SIMON: We're arguing that the existence of

1 signs that are operated by these other companies on property
2 that the city has agreed to enforce the sign laws against, and
3 two years after the city stated in open court that it would
4 enforce those sign laws against those entities, and as we
5 presented evidence in our reply papers, there have been no
6 violations against those signs. It leads one to question --
7 there's an open question that we respectfully believe requires
8 discovery, and it is not as if the adversary proceeding that
9 is pending is at all related to these claims.

10 I mean the city objects that the adversary -- that
11 there is an existing adversary proceeding that requires --
12 that prohibits a 2004 examination, and the discovery that
13 we're requesting here is completely unrelated. Moreover, the
14 adversary proceeding by stipulation and by the city's own
15 motion for relief from stay has been resolved. There won't be
16 any discovery in that adversary proceeding.

17 THE COURT: I think we can work our way through the
18 thicket of the interplay between 2004 and the discovery rules
19 that become part of the Bankruptcy Rules through the 7000
20 series and the incorporation of the discovery rules as a
21 process matter, but it's the substance that I really struggle
22 with here because I see not only a debtor with an awful lot on
23 its plate and really I don't yet perceive great time
24 sensitivity here in terms of "We have to do this now" or "We

1 can do it later," especially if it's more of a subordination
2 issue. We don't know what that claim is yet. We're working
3 on trying to get a number on that claim as I recall our prior
4 hearings, but the idea that the -- I think I would have to see
5 a fair amount indeed to -- for it to make sense, and I
6 question whether it makes sense from the debtor's standpoint,
7 although that's a job for the debtor's principals with the
8 advice of counsel in terms of which direction they want to
9 take this case, but to spend a lot of time and money on
10 investigating whether the city is in effect a collaborator in
11 a conspiracy to put the debtor out of business for any
12 competitive reasons or invidious reasons, as that term is used
13 in the law, typically includes some sort of impermissible
14 discrimination, and I'm just -- I don't see that in the
15 record.

16 I do appreciate that it is a -- I'll say we don't
17 yet have an entirely uncontentious relationship between the
18 city and the debtor. The city is a significant regulator in
19 the world of the debtor's business, and the more productive
20 and substantive that relationship is, the better for this
21 case. Does this move in that direction? Arguably not. Is
22 that a factor? Is that an element under 2012 -- 2004? Only
23 in the broadest sense, but those are some of the things I'm
24 thinking about. I'm trying to understand better what the

1 claim or issue is separate from the adversary proceeding and
2 separate from the general disclosure that goes along with the
3 regulatory proceedings and Freedom of Information and those
4 kinds of things that you're looking to get here.

5 I see in the words of your request, you know, things
6 that are so broad that if this order were entered I don't know
7 how the city could respond. "All documents related to
8 studies, investigations, and deliberations prior to the
9 enactment of Local Law 31 on April 28th, 2005." I can assume
10 that you probably mean "and that relate to," but you don't say
11 it. "All documents concerning Ari Noe."

12 MR. SIMON: The principal of the debtor.

13 THE COURT: Well, his personal -- his New York City
14 tax filings? I mean, and it goes on. To me neither the
15 claims you seek the information in support of, nor the
16 requests themselves are sufficiently clear that I have a sense
17 I have a basis to make a decision that would require the city
18 to produce something in response to this, and I say this
19 knowing of the broad case law under 2004, knowing that fishing
20 is permitted, but also not aware of many cases -- none comes
21 to mind where in other than a maybe a tactical way a regulatee
22 who is a Chapter 11 debtor seeks this kind of relief against
23 an entity that's in effect a regulator.

24 I'm not saying I don't understand the bigger

1 picture. I think I do, but I don't -- I have those big
2 questions and I'm concerned. Anyway --

3 MR. SIMON: Well, your Honor --

4 THE COURT: Please.

5 MR. SIMON: The debtor seeks the examination of very
6 specific individuals. You know, these are people that have
7 been intricately engaged in the enforcement efforts by the
8 city against this particular debtor, and it would be necessary
9 to ask these people the questions why, for example, the dozens
10 of violations against the debtor's signs have been, you know,
11 enforced and cited and litigated while similarly illegal signs
12 and the city's own sign laws have not been.

13 THE COURT: Similarly illegal signs?

14 MR. SIMON: Well, the signs that we presented in our
15 reply papers, they're -- we detailed why each of those signs
16 is illegal under the sign laws and --

17 THE COURT: So is that in effect asking a government
18 actor to reveal its own thought processes about how it made
19 decisions in the exercise of its own judgment? I'll assume
20 all your facts, that there are two similarly situation
21 situations -- I'm not speaking very precisely. Let me
22 restate. That in two comparable situations on the facts, the
23 debtor was cited and the neighbor was not, is that a defense
24 to the debtor?

1 MR. SIMON: Well --

2 THE COURT: I don't understand that.

3 MR. SIMON: Your Honor, when --

4 THE COURT: Short of something like invidious
5 discrimination, some kind of enormous conspiracy that in and
6 of itself breaks the law --

7 MR. SIMON: When counsel for the city arrived today
8 they handed us an Appellate Division First Department case,
9 OTR Media against the City of New York, and I imagine it goes
10 toward --

11 THE COURT: Have you read it?

12 MR. SIMON: Yes, your Honor, I have.

13 THE COURT: I haven't.

14 MR. SIMON: Okay. Does counsel --

15 THE COURT: At least without having the cite I don't
16 know if it's among the cases I've read.

17 MR. SIMON: I'm happy to hand up this copy. Does
18 counsel have an extra copy for --

19 THE COURT: And I'll get it, but I think you can
20 probably tell I've got some -- I have a couple layers of
21 concern. The first is that -- and they don't include that
22 there's an adversary proceeding and we have 2004. We can
23 manage that. Whether you get this discovery, whatever
24 discovery you may be entitled to, and maybe it's nothing and

1 maybe it's something. Whether you get it in this context or
2 that context it's a question of the name of the document and
3 the process that's required, less process actually if you're
4 dealing with a party in an adversary proceeding. As you've
5 indicated, there's nothing in the way of discovery there
6 anyway.

7 So that's not an issue I'm so concerned about, but
8 why -- what this could lead to that would have value in any
9 way for the debtor that would move this case forward is
10 something I'm really struggling with, and whether and to what
11 extent it is a sensible of debtor time and effort I'd like to
12 understand better. If you're entitled -- feel free to stay at
13 the podium. You're doing a fine job. It's just you got a
14 hard issue on your hands, Mr. Simon.

15 If you're entitled to the relief, and I might think
16 it might not make the most sense to go after the city like
17 this, it doesn't matter. You're entitled to it. In my case
18 management role I may have a different set of questions in
19 mind. In my adjudicator on 2004 role it's different
20 questions. You're welcome to confer. I'll hear from Mr.
21 Simon.

22 MR. KUSHNER: Can I --

23 THE COURT: Mr. Kushner, you're welcome to add a --

24 MR. KUSHNER: I want to see if I can --

1 THE COURT: -- footnote or some context if you'd
2 like, and then I do need to hear from the city.

3 MR. KUSHNER: I want to leave Mr. Simon here
4 because --

5 THE COURT: I do too.

6 MR. KUSHNER: But I want to give you a flavor, and
7 maybe it will give you the answer that you're looking for. I
8 think your Honor four months into this case has a pretty good
9 understanding of what the debtor's business is.

10 THE COURT: I hope so.

11 MR. KUSHNER: So the debtor really attacks
12 relationships on two fronts. One is the easel part where it
13 gets the places to promote the advertising from landlords.

14 THE COURT: Mm hmm.

15 MR. KUSHNER: And the other is the artistic part
16 where it goes outside to advertisers. I mentioned Sony, BMW,
17 various large national types of advertisers who promote their
18 products where these sites are believed to have significant
19 value.

20 So let me give you a flavor of what the debtor's
21 problem has been as a result of what we believe to be the
22 selective enforcement. Ari Noe goes to Sony Corporation in
23 Los Angeles and tries to get a program with Sony Corporation
24 which has been its biggest customer, and Sony Corporation says

1 to Mr. Noe, "Why should we advertise with you? The city seems
2 to have something against you." Viacom is -- Viacom is a
3 national large company, CBS is a large company. Van Wagner is
4 a large company, all of which we've outlined their
5 significance to this application.

6 Sony will say, "These folks have similar signs on
7 locations across the street. Why shouldn't we advertise with
8 them? The city leaves them alone," and all of those signs are
9 pointed out in our reply to the city's opposition where the
10 city had mentioned to the Second Circuit I believe --

11 MR. SIMON: The Appellate Division.

12 MR. KUSHNER: The Appellate Division that it would
13 in fact two and a half years ago do the same type of
14 enforcements to the Van Wagner's, the Viacom's, and the CBS's
15 of the world. They haven't done that.

16 The landlord has the same problem, public relations
17 problem with Mr. Noe and the debtor by saying, "Why should we
18 give our space to you, OTR, when every step that you take,
19 every step of the way there's a city violation? We can't do
20 business that way." Well, if we're doing something wrong, as
21 the city says, that's one thing. That's already been
22 determined to be litigated in a separate court. Those answers
23 certainly will be -- remain to be seen, but if the city is
24 doing something wrong, your Honor, in the way in which it

1 enforces laws that are supposed to apply to everybody in this
2 business evenly including the Viacom's, the Van Wagner's, the
3 Clear Channel's of the world, and we believe that there's a
4 basis to do it. We just didn't throw a dart in the dark here.

5 We showed you examples of those things.

6 We would like to investigate why those applications
7 -- those signs are not being similarly enforced when we know
8 that there may be something wrong with those signs, not that
9 there's something wrong with our signs because we're defending
10 those, but we know that there's something wrong with theirs,
11 and it's preventing us from doing business in the marketplace
12 with not only advertisers, but with our landlords. We have a
13 fiduciary duty on behalf of all creditors, landlords, vendors
14 that we hire, taxing authorities to pursue these types of
15 claims against the city for selective enforcement.

16 THE COURT: Claims.

17 MR. KUSHNER: Claims.

18 THE COURT: Mr. Kushner, what is the cause of
19 action? I don't understand the cause of action.

20 MR. KUSHNER: The cause of action, certainly if
21 there's a violation of the selective enforcement statute under
22 Constitutional grounds there's a claim.

23 THE COURT: What is the Constitutional claim?

24 MR. KUSHNER: I'm not an expert in Constitutional

1 law, but I understand that under 42 U.S.C. 1983 there's not
2 only a cause of action, but there's a claim for damages and
3 treble damages. Those are the types of the claims that could
4 be brought.


5 THE COURT: I think you may have to brief those
6 issues. I'm just not seeing here, and I'm also wondering is
7 this any kind of a sensible way for this debtor to be engaging
8 with the City of New York?

9 MR. KUSHNER: Well, your --

10 THE COURT: Which is causing your major perspective
11 clients to say, "You know, you have a terrible relationship
12 with the City of New York. Why shouldn't be working with
13 somebody else because they have a good relationship with the
14 City of New York?"

15 MR. KUSHNER: Judge, Judge, we -- I can -- we're
16 four months into this case. We filed one litigation in order
17 just to get a semblance of some peace. That was a declaratory
18 judgment that either the stay doesn't apply or it does apply.
19 That was what the litigation has been so far with the city.
20 We have sat down with the city to try to investigate ways in
21 which to settle the monetary claims and to get more even
22 keelness on the way in which the city are enforcing these
23 laws.

24 THE COURT: You have a huge opportunity through this



1 case to shift the track perhaps of the debtor's working
2 relationship with the city from one that has been expensive
3 and comparatively unproductive for the business to one that is
4 less costly, less burdensome, and productive. That's status
5 more than it's --

6 MR. KUSHNER: It's not going to happen with --

7 THE COURT: -- 2004.

8 MR. KUSHNER: -- the city, Judge, and as debtor's
9 counsel who's been involved on a day to day basis, it's not
10 going to happen your way, not because the debtor doesn't want
11 it. It's because we've been told that there is no ear that
12 hears on the other side. There's a mission here. Now we want
13 to get behind that mission. We have not fired the first
14 arrow. We are now in a position where we have tried to
15 negotiate. We're not using this as leverage. We're using
16 this as trying to investigate whether or not in the face of an
17 adversarial relationship to the city, which exists for
18 whatever reasons, we have an exit strategy from Chapter 11
19 either by affirmative claims against the city or by equitably
20 subordinating their claim because they didn't -- they did not
21 enforce the sign laws as they are required to do by way of
22 law.

23 THE COURT: But would this -- assume hypothetically
24 that there should also be many other defendants in these kinds

1 of proceedings that would effect those business, but it would
2 not reduce by a farthing the amounts, through a process that I
3 assume withstands scrutiny, the city has found the debtor of.

4 I don't see how it changes your balance sheet to have -- if
5 you could successfully argue, you know, "They didn't ticket
6 the people across the street. We think city inspectors on the
7 take." I can't tell what you're suggesting because your
8 papers use --

9 MR. KUSHNER: Because maybe the --

10 THE COURT: -- a phrase, "selective enforcement,"
11 and cite the Second Circuit case, but don't -- I think I'm
12 going to need more perhaps both on the law and the facts, and
13 it's going to be your decision whether this is the time and
14 whether it's worth the effort, but to go down this path in the
15 management of this case.

16 MR. KUSHNER: If you do not authorize some sort of
17 investigatory right, and the only way I think is appropriate
18 is through 2004 in this case, then this case might as well
19 convert tomorrow because the city is not going to, based upon
20 my experience of a bankruptcy lawyer who's been doing this for
21 25 years, they have not come or have shown a willingness to
22 come to the table to negotiate, period. I'm stating that on
23 the record.

24 THE COURT: Well --

1 MR. KUSHNER: Perhaps the secured lender has
2 something to say about it, okay, but these debt -- this debtor
3 will lose its ability to operate a lawful business. Perhaps
4 the city will think twice if the Court does authorize some
5 reasonable discovery under this case to allow the debtor to
6 investigate whether the city is at risk for permitting
7 violations of law that will help this debtor emerge from
8 Chapter.

9 THE COURT: Well, what you are describing, and the
10 sort of precise and targeted inquiry that you propose strikes
11 me as different than what's in your papers, and the kinds of
12 things that you're suggesting as potential claims are not set
13 forth really in your papers in a way that gives me a basis to
14 appreciate that, yes, these are claims with elements that
15 courts have recognized in an appropriate record whether it's
16 the context of anti-competitive or corruption. I don't know.
17 It's hard to tell what you're saying.

18 I can tell that there's a problem. I can perceive
19 there's a problem, but I can't tell what kind or flavor of
20 problem.

21 MR. KUSHNER: If you want me to identify the
22 remedies that are available if after discovery these facts
23 would support it, I'll be happy to supplement it.

24 THE COURT: I think what I -- well, I have to think

1 about what makes sense as a next step. I need to hear from
2 the city because of course these are very serious things that
3 you're identifying as issues or possible issues, and you do it
4 as a respected practitioner, each of you and officer of this
5 Court.

6 I'm concerned to hear that there is not yet any
7 productive engagement on the process side. I will remind all
8 the parties that you have worked out in the context, for
9 example, of the stay relief and the going ahead of the city's
10 regulatory process as to existing signs. The city's doing its
11 job as city in the public interest. Things have actually
12 gotten worked out in this case.

13 MR. KUSHNER: Except --

14 THE COURT: Not easily, but they have.

15 MR. KUSHNER: They worked out, your Honor, after
16 your Honor put the Court's touch on it. Your Honor was the
17 one who decided the framework first before the city was
18 willing to concede that it --

19 THE COURT: I know I'm going to interrupt you, and I
20 regret it, but no one conceded in those arrangements. Neither
21 the debtor nor the city conceded. You both did your jobs, and
22 if I helped then so much the better.

23 MR. KUSHNER: You did.

24 THE COURT: And I haven't exactly been quiet this

1 afternoon, so maybe I've given you some things to think about,
2 but I'm concerned both for the city's ability to do its job
3 productively and for the debtor's ability to continue to move
4 forward in reorganizing --

5 MR. KUSHNER: This doesn't --

6 THE COURT: -- about this -- about the way that this
7 is being approached.

8 MR. KUSHNER: This doesn't effect the way that the
9 city does its job. This -- the city's doing whatever it
10 thinks it's appropriate to enforce the sign laws, and I assure
11 you, your Honor, we're now attending hearings as a result of -
12 - in ECB courts as a result of new violations or purported
13 violations, and we're going forward with that process. This
14 doesn't effect the way that the city's doing its job. We're
15 not seeking to do that.

16 We're seeking to, certainly on the equitable
17 subordination claim, okay, if the city acted adverse to the
18 debtor's interest, okay, that is one basis to knock out a
19 claim. That certainly aids our reorganization.

20 THE COURT: Would you view it as adverse to the
21 debtor's interest to cite it for violations of law?

22 MR. KUSHNER: No.

23 THE COURT: I mean I suppose in some way technically
24 it is --

1 MR. KUSHNER: No.

2 THE COURT: -- but not in way that would lead to
3 subordination.

4 MR. KUSHNER: No, no, no. We're talking about --
5 about using the sign laws to effectively favor somebody else
6 in that same industry. Forget about what the debtor did.
7 We're the red-headed stepchild, if you will, your Honor.
8 We're the ones who no matter what we put up, it's a violation.

9 THE COURT: All right. I'd like to hear from the
10 city. I'd like you to think about these issues. I'm going to
11 actually ask you to confer with each other, and I do think if
12 there's matters that -- the kinds of things that I still don't
13 see clearly enough on the record, I may try to be specific
14 about it in terms of where I want you to address further
15 issues because given the kinds of things that you're
16 suggesting this discovery be in support of, I don't see those
17 things in this record, and I see a very broad -- impracticably
18 broad request.

19 I'm wondering if there is some productive way to
20 improve the -- and expedite the process of information
21 exchange and dispute management between the city, and I don't
22 mean you're disputing now. You're doing your jobs now, but
23 there are a number of proceedings out there, and how ever we
24 can best move those forward that's efficient for the city and

1 efficient for the debtor is a good thing. I'm trying to
2 reflect on whether on our mediation register we have anybody
3 with significant administrative, in the sense of
4 administrative law experience who could help be a broker
5 almost to facilitate that process.

6 The city can't compromise on its regulatory role or
7 on the due process that the debtor will get, nor can the
8 debtor compromise unproductively its prerogative to defend
9 against allegations it believes aren't well founded, but that
10 doesn't mean there isn't a solution out there.

11 So let me hear from the city and then I'm going to
12 give some time to confer with each other.

13 MR. KLEINMAN: Your Honor, I think you said better
14 than I could what the city's legal position with respect to
15 there is no cause of --

16 THE COURT: I had the benefit of your papers.

17 MR. KLEINMAN: Let me just tell you one vignette
18 because Mr. Kushner keeps saying things, I don't know directed
19 at me or directed at the city which I'm just -- is belied by
20 what's going on, so Mr. Holzer I think in November came over
21 to me and said, "Oh, by the way, here's the piece of paper
22 which shows that this particular sign is legal because it's
23 really stayed on property." So I said, "Thank you very much,"
24 took it home. I read it. It didn't seem to support it. I

1 wrote back to Mr. Holzer. I said, "Doesn't seem to support
2 it. What else do you have?" and after some very nasty e-mails
3 from them to me I asked them again to, "Well, what's your
4 legal basis here for saying that this sign is exempt from the
5 sign laws?" and now, I don't know, a month and a half later I
6 still don't know.

7 So my mode of practice, your Honor, in everything
8 for the last 33 years is where things can be worked out and if
9 there's a legal issue and I can be of assistance, I'd be happy
10 to be of assistance. I have been knocking my head against the
11 wall to try and move forward with that. That's one vignette.

12 The other vignette, you know, we have been trying
13 since the beginning of this case to understand what signs the
14 debtor currently owns, and I don't know if you recall, but
15 there was this long months period of time just to try and
16 figure out what that list is.

17 THE COURT: The debtor, debtor and affiliated
18 entities, separate entities is common ownership. I have a
19 general recollection of the record in that regard.

20 MR. KLEINMAN: And so we got a list and then we've -
21 - we get calls from landlords who get the penalties, and we
22 now look at the schedule and we look at the list and they
23 don't match. So we ask our adversaries politely in an e-mail,
24 "Please tell us what's going on." So when Mr. Kushner

1 suggests that the City Law Department is somehow opposed to
2 trying to resolve things here, that's just not true and I take
3 personal offense from it, and I guess more --

4 THE COURT: I appreciate that. I think you each
5 authentically hold the views that you articulate. We have a
6 lot of talent and experience in the room. I would like to
7 improve on that situation and I --

8 MR. KLEINMAN: Well --

9 THE COURT: -- say that in a general way.

10 MR. KLEINMAN: So I would --

11 THE COURT: You're too good to misunderstand each
12 other at this basic a level.

13 MR. KLEINMAN: So I don't know. So just the
14 question of being able to ask questions to get answers without
15 the Court's intervention is something that would move things
16 along, and the other thing that would move things along
17 because it's not I who make determinations about the
18 lawfulness of signs, is what I've been trying to do from day
19 one is to move the process along so violations are issued and
20 the various adjudicatory bodies happen here, and as I point
21 out in my papers, what doesn't make any sense with respect to
22 this conspiracy claim is that there are multiple layers here.
23 I don't -- I couldn't even begin to understand how such a
24 conspiracy could be constituted because it's -- the sign

1 enforcement concerns the Department of Buildings, it concerns
2 the Environmental Control Board, it concerns ALJ's at the
3 Environmental Control Board, it concerns the Board that is the
4 Environmental Control Board. It includes state courts which
5 have, you know, rights to review under Article 78.

6 So I don't even understand how such a conspiracy
7 could possibly take place given all these multiple layers, and
8 I guess that would implicate the Law Department in this
9 conspiracy because, you know, now that I'm involved after not
10 being involved in this for a couple of years, you know, I
11 guess I must be part of the conspiracy now too because there's
12 a conspiracy, but there is not one wit of evidence here to
13 support the conspiracy, and just to, you know, they talk about
14 the big corporate players who have petitioned the city. Well,
15 so they enclosed some copies of drafts of e-mails to the city
16 in 2003 that corporations wanted to change the law. Well,
17 they failed in changing the law. In fact, the law became
18 tougher, and you know, then these big corporations sued the
19 city for several years.

20 So the notion that there's some conspiracy between
21 the city and these public corporations is completely,
22 completely fanciful. The other big sign --

23 THE COURT: That being said, it is not the first
24 time that a small or smaller than some business has been

1 frustrated, if frustration is an appropriate word here by a
2 regulatory process, so that's --

3 MR. KLEINMAN: Right, but --

4 THE COURT: It may not be actionable, but it is
5 something we should all care about.

6 MR. KLEINMAN: Well, I would like for the
7 adjudications to move forward as quickly as possible and then
8 we will know -- I guess we still need to know what their sign
9 locations are and then we need to get adjudications and find
10 out whether they're lawful or not. I mean that's not my
11 determination. It's not mine to decide.

12 THE COURT: It's pretty straightforward.

13 MR. KLEINMAN: That's right. It is very
14 straightforward. So I'd just like to say one other thing. I
15 think your Honor has put, you know, the nails in the coffin of
16 this claim, which is not really a claim, but I do want the
17 decision which Mr. Simon was referring to -- if I may
18 approach, your Honor? It's just a decision in which --

19 THE COURT: My courtroom deputy is right here.

20 MR. KLEINMAN: So while OTR thinks --

21 THE COURT: This is the case you've invited me to
22 look at. Is that right, Mr. Simon?

23 MR. KLEINMAN: I provided it to everybody, your
24 Honor. So this is a -- the name of the case is OTR versus the

1 City of New York. They were the plaintiff here, and they
2 challenged, you know, the application of the laws as to them
3 and they lost, and on --

4 THE COURT: Was this as applied or was this a
5 Constitutional challenge --

6 MR. KLEINMAN: Well, this was --

7 THE COURT: -- under Central Hudson?

8 MR. KLEINMAN: And so here's what the Court says,
9 and I'm reading on page 453 of the 83 Appellate Division
10 Reporter. It's in there. "We further hold that the subject
11 regulations and penalty schedule do not violate plaintiff's
12 right to equal protection. The record is bereft of evidence
13 that the city selectively enforces the regulations and penalty
14 schedule against plaintiff and other similarly situated
15 outdoor advertising companies, but refrains from enforcing
16 them against government and quasi-government entities such as
17 the MTA, the Port Authority, and Amtrak," and then the
18 decision goes on to say, and I quote again, repeating your
19 Constitutional analysis, which I think is impeccable here,
20 quote, "In any event, plaintiff is not similarly situated to
21 any of these entities for purposes of equal protection
22 analysis."

23 So not only, your Honor, is -- are you completely
24 correct in your analysis that there's no claim here, but it's

1 also res judicata. OTR --

2 THE COURT: Well, this went to a different point. I
3 take this case to be more the question of the governmental or
4 quasi-governmental, whether it was deference or exemption,
5 which is not the argument being made today, not even close.
6 It's a question of what has -- perhaps to be responsive to my
7 question because one likes to be responsive questions, some
8 kind of invidious discrimination, some kind of inappropriate
9 discrimination, some kind of big versus small or any
10 competitive behavior as opposed to what was perceived to be,
11 and I guess as a policy matter eventually was modified
12 exemption from governmental -- now reading from the decision,
13 "governmental and quasi-governmental entities such as the MTA,
14 the Port Authority, and Amtrak."

15 So anyway, yes, many of these issues do seem to be
16 well-traveled ground. I leave it to the day that the parties
17 ask me to decide something in that context. I still have the
18 question to what end? Bigger in the case management context,
19 precisely in the claim that would have value for the case, if
20 the goal is to as a management matter get the city's
21 attention, you've completely done that. To get the Court's
22 attention, you've done that too.

23 I'd like you to think about ways you can move this
24 forward. I'm looking at a couple of our panel mediators who

1 have potentially relevant experience, including the former
2 chief of the Tax and Bankruptcy Group at the Southern District
3 U.S. Attorney's Office and of course, the former justice from
4 the Commercial Division of New York Supreme in New York
5 County, Herman Kahn, Justice Kahn, now I guess, attorney Kahn
6 has a lot of experience in being a dispute resolver. Is there
7 an appropriate role for someone like that here? I don't know.
8 I don't know, but --

9 MR. KLEINMAN: Well, my door is open to Mr. Kushner
10 to talk about whatever to try and move the case forward.

11 THE COURT: And I want to --

12 MR. KLEINMAN: It is simply not my position to ever
13 practice otherwise. In fact --

14 THE COURT: I'm glad to hear that.

15 MR. KLEINMAN: -- my style of lawyering is to try
16 and avoid being in court because once you're in court you've
17 already lost to some extent. So I try and resolve everything
18 prior to court, and this is sort of -- this is a somewhat rare
19 experience for me to be --

20 THE COURT: Then this case --

21 MR. KLEINMAN: -- back at court litigating.

22 THE COURT: This case presents a rich opportunity
23 for you then, and I'm glad to know that. We do have a lot of
24 conference rooms here in our large courthouse, and both the

1 courtrooms and the conference rooms are also used -- are often
2 used very effectively by the parties. I think you have a
3 sense of the kinds of things that I'm focusing on here and the
4 steps I'm prepared to take.

5 I am not inclined to grant or deny the application
6 today. I don't think I have enough before me in order to do
7 either, and any denial would be without prejudice of course.
8 There's no order that I would issue that would close the door
9 forever in a case of 2004. I put a lot on the debtor's plate
10 for this break, which based on my schedule can't be terribly
11 long, both the compensation issues and some way forward on
12 these issues, authentic informational issues that will create
13 value for the debtor, move this case forward, that's what I
14 need to hear about, and maybe see more briefing on if it comes
15 to that.

16 Another venue for the frustration that the debtor
17 obviously feels in dealing with the city, I'm hoping we have
18 the right people in the room to make progress on that, and I
19 want to underscore something that was just said by corporate
20 counsel, talk, talking rather than e-mail may be a way to make
21 some progress here. Listening may be even more productive,
22 and I don't say this in some sort of soft-hearted desire to
23 promote a soft solution to a hard problem. I think it's
24 actually the hardest work you can do in the case.

1 So I'm going to give you a chance to do that.
2 Because of some limitations on my own schedule, though I want
3 to hear what you have to say, I'm not going to be able to
4 right this moment. Let's go off the record briefly, talk
5 about scheduling for this afternoon, and then maybe I'll let
6 you get to it, but let's go off the record just so that we can
7 productively informal about scheduling.

8 MR. KUSHNER: On this case, your Honor?

9 THE COURT: On this case.

10 MR. KUSHNER: Well, what I'd like -- I'd like to
11 take -- I think you were inviting some additional briefing.

12 THE COURT: If we need it, but I'd like to go off
13 the record for -- just for figuring out how to use the next
14 hour or so.

15 (Off the record/On the record)

16 THE COURT: All right. We're back on the record.
17 It's my sense with respect to case management that it may well
18 sense to carry these matters for a telephonic conference
19 within -- in the next week to two weeks to give the parties a
20 targeted opportunity to meet and confer directly on a way to
21 address the issues narrow and broad encompassed by the 2004
22 examination and all of the matters between the city and the
23 debtor, and then perhaps thereafter to carry the matters for -
24 - in person for further proceedings as appropriate on our

1 continued date of February 14th at 11:00.

2 Ms. Jackson suggests January 30th at 9:30 or 10:00
3 for that telephonic conference. I think if that makes sense -
4 -

5 MR. KLEINMAN: January 30 is not good for me, your
6 Honor.

7 MR. KUSHNER: Nor I, Judge.

8 THE COURT: Well see, we're getting agreement
9 already. I'm glad to have characterized it in that way. Is
10 it the week or is it the day?

11 MR. KLEINMAN: The day.

12 THE COURT: The 31st at 9:00? That's a Tuesday, or
13 3:00.

14 MR. KUSHNER: 3:00 is okay.

15 THE COURT: I think that should be fine.

16 MR. KLEINMAN: I'm sorry. What did he suggest?

17 THE COURT: Tuesday, the 31st of January at 3:00
18 with the direction to confer in person before that.

19 Ms. Martin, anything to add?

20 MS. MARTIN: Your Honor, my suggestion with regard
21 to the request for the fee application would be, you know,
22 we're willing to allow the debtor to take the pre-petition
23 retainer, and perhaps if we do adjourn it to this -- is this a
24 date for telephonic conference?

1 THE COURT: Yes. Yes. January 31st.

2 MS. MARTIN: Because by that time perhaps the
3 December report could be filed and --

4 THE COURT: I'm sure it will.

5 MS. MARTIN: -- perhaps our issues can be resolved
6 by then, your Honor.

7 THE COURT: It certainly seems like it would be
8 filed by then. If there is an interim order on consent that
9 gets us -- give everyone the confidence that the matter is
10 indeed moving forward on a consensual basis that you'd like to
11 submit between now and then, we'll take up the rest on the
12 31st. Does that make sense?

13 MR. KUSHNER: Yes, it does.

14 THE COURT: Ms. Martin, can you work with that?

15 MS. MARTIN: Yes, your Honor.

16 THE COURT: Okay. So granted in part on consent.
17 You'll submit an order on consent. Little by little we'll
18 make the progress.

19 January 31st at 3:00. That doesn't go in the
20 docket, but that will be telephonic. Of course, if you'd like
21 to come to the courtroom you're always welcome to an elevator
22 ride as opposed to a trip, and as to the motion for the 2004
23 exam you're directed to confer in person on all of the issues
24 as reflected in the record if that's useful, and then mark

1 this over to 3:00 o'clock on January 31st.

2 Anything further on this matter?

3 MR. KLEINMAN: We just want to reiterate that I am
4 happy to talk, and I think talking can make a lot of progress.

5 I just want to reiterate that I don't adjudicate signs for
6 the City of New York. There's somebody else who does that,
7 and while I can help the process and maybe help with legal
8 issues, ultimately it's not for me to sit down with any
9 regulatee and work out the legality of their operations.

10 THE COURT: A given, but it's absolutely clear to me
11 that you're here in the capacity as part of the solution as
12 opposed to part of the problem. I see that as each of your
13 roles at this point, and I encourage you to take a few minutes
14 to get started, including with your calendars to figure out
15 when you're going to have that lunch. Use my conference room
16 if you'd like.

17 Mr. Kushner, do you need to be here for the Azuka
18 matters?

19 MR. KUSHNER: Yes.

20 THE COURT: All right. We have matters to follow,
21 so we're going to take a few minutes.

22 MR. KUSHNER: If you can hear them, we'll be --

23 THE COURT: We'll do them quickly and right now.

24 MR. KUSHNER: Okay.

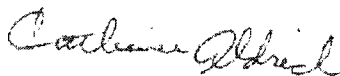
1 THE COURT: We'll do them as quickly as we can and
2 right now.

3 Thank you very much.
4

5 * * *

6 CERTIFICATION

7
8 I, Catherine Aldrich, certify that the foregoing is a correct
9 transcript from the electronic sound recordings of the
10 proceedings in the above-entitled matter.
11

12 

January 27, 2012

13 Catherine Aldrich